LIM CHEE TAT v. MAYBANK ISLAMIC BHD

COURT OF APPEAL, PUTRAJAYA
SURAYA OTHMAN JCA
CHE MOHD RUZIMA GHAZALI JCA
AZIMAH OMAR JCA
[CIVIL APPEAL NO: W-03(IM)(MUA)-53-06-2022]
25 AUGUST 2023

Abstract – *An annulment of a bankruptcy order under s. 105 of the Insolvency Act 1967 has the general effect of treating the former bankrupt as if no bankruptcy order had been made against him. However, the annulment order cannot be wielded against the bankrupt who has had his bankruptcy annulled. The annulment order must indeed be used for the bankrupt's own benefit and not for the benefit of others. Hence, the retrospectivity of an annulment order does not go as far as to wipe out the fact that a bankruptcy order had indeed existed. It follows that the commencement of any action against a bankrupt person, must be with the leave of court pursuant to s. 8(1) of the Insolvency Act 1967*

BANKRUPTCY: *Adjudication and receiving orders – Annulment – Whether has retrospective effect of annulling bankruptcy status of bankrupt – Whether commencement of any action against bankrupt person only with leave of court – Whether leave not relevant due to annulment order – Whether failure to obtain leave amounted to fundamental defect – Whether curable in nature – Insolvency Act 1967, ss. 8(1) & 105*

BANKRUPTCY: *Practice and procedure – Parties – Commencement of suit against bankrupt – Whether with leave of court – Bankrupt obtained annulment order – Whether has retrospective effect of annulling bankruptcy status – Whether no leave required – Whether failure to obtain leave amounted to breach of s. 8(1) of Insolvency Act 1967*

CIVIL PROCEDURE: *Action – Leave application – Commencement of suit against bankrupt premised on judgment in default ('JID') – Whether with leave of court – Bankrupt obtained annulment order – Whether has retrospective effect of annulling bankruptcy status – Whether no leave required – Creditor failed to obtain leave and failed to serve cause papers on Director General of Insolvency – Whether amounted to breach of s. 8(1) of Insolvency Act 1967 – Whether nullity or irregularity that may be curable – Whether JID ought to be set aside ex debito justitiae*

Sunhor Builders Sdn Bhd ('first defendant') was granted banking facilities by the respondent, secured by guarantee of repayment by the directors of the first defendant, the appellant and Teh Lai Hoon, the second and third defendants respectively in the High Court. When the first defendant defaulted in the repayments of the facilities, the respondent issued demands for

payments of the outstanding sums from all three defendants. However, the demands were neglected and therefore, the respondent commenced a writ action ('Suit 198') against all three defendants to recover the outstanding sums. Upon the defendants' failure to enter appearance, judgment in default ('JID') was entered against all three defendants on 23 November 2016. Unbeknownst to the respondent, prior to the commencement of the writ action, the appellant had been adjudicated a bankrupt *vide* a bankruptcy petition present by another creditor ('2016 bankruptcy'). On 13 June 2019, the appellant had successfully obtained an annulment order against the 2016 bankruptcy under s. 105 of the Bankruptcy Act 1967 (now Insolvency Act 1967) ('Act'). Meanwhile, premised on the JID, the respondent commenced a bankruptcy proceeding against the appellant in July 2019. On 5 February 2020, the respondent obtained an adjudication and receiving order ('AORO') against the appellant ('2019 bankruptcy'), but the AORO was set aside on the appellant's application. The appellant thus filed an application in Suit 198 for, *inter alia*, the following orders: (i) an extension of time to file the application to set aside the JID; (ii) to set aside the JID dated 23 November 2016; and (iii) leave to defend the action in Suit 198. The appellant's application was set aside by the Senior Assistant Registrar and the decision was affirmed, on appeal, by the Judicial Commissioner. Hence this appeal wherein the issues raised for determination were: (i) whether the five years old JID dated 23 November 2016 obtained by the respondent against the appellants, who was at the material time an undischarged bankrupt, and the respondent had not obtained the leave of court under s. 8(1) of the Act, was an irregular judgment and a nullity, and should be set aside *ex debito justitiae*; (ii) if the answer in issue (i) was in the affirmative, whether the trite legal position that an annulment order made pursuant to s. 105 of the Act has a retrospective effect on a bankrupt's bankruptcy (*ie*, it wipes out the appellant's bankruptcy) would also have a retrospective effect on the irregularly obtained judgment entered against him; and (iii) whether the appellant's delay in filing the application to set aside the irregular JID was a relevant consideration in determining the propriety of the appellant's application.

Held (allowing appellant's appeal with costs; remitting case to High Court for Suit 198 to proceed)

Per Azimah Omar JCA delivering the judgment of court:

(1) Section 8(1) of the Act clearly stipulates that in the commencement of any action or any other legal proceeding against a bankrupt person in respect of the debt upon which the action or proceeding ought to be commenced, the creditor shall first obtain leave of the court except stated otherwise in the Act. Without leave being obtained at first instance, no creditor has any remedy against either a debtor's property

or person, nor can a creditor proceed with or commence any legal proceeding for the debt. At the time of filing of the writ action, the appellant was already an undischarged bankrupt and, no leave was obtained pursuant to s. 8(1) of the Act and the cause papers in Suit 198 were not served on the Director General of Insolvency ('DGI'). There was a clear breach of s. 8(1) of the Act and therefore, the JID ought to be set aside *ex debito justitiae*. (paras 28, 29, 31 & 32)

(2) The appellant had obtained an annulment order annulling his 2016 bankruptcy status pursuant to s. 105 of the Act, which has a retrospective effect of wiping out the status of bankruptcy of a bankrupt altogether and effectively puts the bankrupt in a position as if no bankruptcy order has ever been made. However, the fact that a bankruptcy order was in fact made should not be wholly disregarded. The Act, *via* s. 105(2), only validates all acts done by the DGI, persons acting under the DGI's authority and the court pertaining to the administration of the bankrupt's estate. It definitely could not be taken to operate to validate the statutory non-compliance of a creditor who seeks to recover a debt owing by the bankrupt. (paras 36, 40 & 49)

(3) A nullity or irregularity may be curable depending on the type of nullity or irregularity that was involved in a particular case. In the present case, the respondent did not apply or obtain the required statutory leave of court pursuant to s. 8(1) of the Act which is compulsory in nature. The failure to comply with the said provision was indeed a fundamental defect and was non-curable. (para 49)

(4) It could not be correct to hold that just because there was an annulment order, the leave of court was no longer relevant. It was for the respondent to prove to the court it had satisfied the required threshold to be granted leave. In the absence of such application, it certainly could not be said that the court even had the opportunity to consider and deliberate on whether leave should be granted. The benefit that could be derived from the annulment order that he had obtained was indeed the appellant's benefit *in personam*. It was not for the benefit of the respondent that could operate as a 'remedial' tool to cure the clear and undisputed non-compliance of law on the part of the respondent. (para 49)

(5) Although delay defeats justice, the court still retains some discretion to set aside *ex debito justitiae* an irregular judgment or order despite a long delay if the delay could be explained or justified. It could not be said that the appellant was in any manner or measure indolent or ignorant in protecting his rights. Since the advent of the 2016 bankruptcy, he had fought tooth and nail to annul the 2016 bankruptcy and succeeded. Even in respect of the 2019 bankruptcy, the initial delay from the 2016 JID

to the 2019 bankruptcy was brought upon by the respondent, who, having obtained the JID in 2016, only commenced the 2019 bankruptcy proceedings in July 2019. Hence, despite the delay, it was only just and appropriate for the court to exercise its discretion, considering the appellant's unrelenting tenacity to defend against the respondent's claims. All these facts coupled with the respondent's irregular commencement of Suit 198, and the irregular attainment of the JID, would clearly justify that the appellant should have his day in court to defend against the respondent's claims. (paras 52-54 & 59)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Dato' Hj Mohd Muslim Othman v. Shuaib Lazim & Anor [1993] 2 CLJ 177 HC ***(dist)***
Engel V Peri [2002] EWHC 799 ***(refd)***
Ho Ken Seng v. Progressive Insurance Sdn Bhd [2013] 1 CLJ 518 CA ***(refd)***
Ho Ken Seng v. Progressive Insurance Sdn Bhd [2013] 2 CLJ 601 FC ***(refd)***
Inland Revenue Commissioners v. McEntaggart And Another [2004] EWHC 3431 ***(refd)***
Khaw Tiew Chai v. Lee Chai Seng & Ors And Another Appeal [2018] 1 LNS 1516 CA ***(dist)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***
Kwong Yik Bank Bhd v. Hah Chiew Yin 1985] 2 CLJ 31; [1985] CLJ (Rep) 178 FC ***(refd)***
Lai Yoke Ngan & Anor. v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***
Latew Bakuh & Anor v. Johari Abdullah & Ors [2009] 9 CLJ 353 HC ***(refd)***
Lau Kok Loon v. Low Yee Meng [2021] 8 CLJ 643 HC ***(refd)***
Lee Tain Tshung v. Hong Leong Finance Bhd [2000] 4 CLJ 15 CA ***(refd)***
LGB Engineering Sdn Bhd & Ors v. Rayston Resources Sn Bhd [2022] 1 LNS 1997 CA ***(refd)***
Malayan Banking Bhd v. Gan Bee San & Ors And Another Appeal; SKS Foam (M) Sdn Bhd (Intervener) [2019] 1 CLJ 575 FC ***(refd)***
Malayan United Bank Bhd v. Mohammed Salleh Mohammed Yusoff & Ors [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762 HC ***(refd)***
Mohamed Hanifa Mohamed Yusoof v. Sikandar Batcha Abdul Majeed [2002] 7 CLJ 77 HC ***(dist)***
Munday v. Hilburn [2014] EWHC 4496 ***(refd)***
Oraki And Another Dean & Dean (A Firm) And Another [2013] EWCA Civ 1629 ***(refd)***
Public Finance Bhd v. Zainal Osman Putera Foto Studio [2001] 1 LNS 331 HC ***(refd)***
Roberts v. Wayne Roberts Concrete Construction [2004] 208 ALR 532 ***(refd)***
Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd [2010] 2 CLJ 661 FC ***(dist)***
Shuaib Lazim, Re: ex p; Mercantile Insurance Sdn Bhd [1992] 4 CLJ 2066; [1992] 3 CLJ (Rep) 58 HC ***(refd)***
Tetuan Tan Teng Siah Realty Sdn Bhd v. Island Oil Palm Plantations Sdn Bhd & Anor [1997] 4 CLJ 634 HC ***(refd)***
Tractors Malaysia (1982) Sdn Bhd v. Chiew Chong Huat & Ors [1999] 2 CLJ 51 HC ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***
Witech Sdn Bhd & Ors v. BHR Group Ltd [2010] 9 CLJ 288 CA ***(refd)***
Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(refd)***

Legislation referred to:
Insolvency Act 1967, ss. 8(1), 38, 92(1), 105(1), (2)
Rules of Court 2012, O. 13 r. 8, O. 42 r. 13
Societies Act 1966, s. 9A(1)(d)

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For the respondent - Syed Fadzil Alhabshi, Noraini Yacob & Farah Diana Addrus; M/s Sidek Teoh Wong & Dennis

[Editor's note: For the High Court judgment, please see Maybank Islamic Bhd v. Sunhor Builders Sdn Bhd & Ors [2022] 9 CLJ 956 (overruled).]

Reported by S Barathi

JUDGMENT

Azimah Omar JCA:

Introduction

[1] The appeal before us is the appellant's complaint against the learned Judicial Commissioner's decision on 9 March 2022 to dismiss the appellant's appeal (effectively confirming the Senior Assistant Registrar's ("SAR") earlier decision dated 14 December 2021 to dismiss the appellant's application to set aside a judgment in default entered against the appellant on 23 November 2016) ("JID").

[2] The appellant contended that when the JID was entered on 23 November 2016, the appellant was an undischarged bankrupt and in entering the JID against the appellant (being a bankrupt), the respondent did not first, obtain the required leave of court under s. 8(1) of the (then) Bankruptcy Act 1967 (now Insolvency Act 1967) ("the Act").

[3] Therefore, it is the appellant's position that in the absence of leave of court prescribed under s. 8(1) of the Act, the JID entered against the appellant (as an undischarged bankrupt) was therefore an irregular judgment and must be set aside *ex debito justitiae*.

Facts Of The Case

[4] For a better understanding of the matter at hand, it is necessary for us to set out the facts of the case that has led to the present appeal:

(i) Sunhor Builders Sdn Bhd (first defendant) was granted banking facilities by the respondent (Maybank Islamic Berhad). As security, the appellant (Lim Chee Tat – second defendant) and the third defendant (Teh Lai Hoon) had guaranteed the repayment of the banking facilities;

A (ii) the appellant and the third defendant were directors of the first defendant. The second and third defendants were not a party in the appeal;

(iii) the first defendant had defaulted in the repayments of the facilities which had pressed the respondent to issue demands for payments of
B the outstanding sums from all three defendants;

(iv) the demand made by the respondent was however neglected by the three defendants. Thereafter, on 21 October 2016, the respondent had commenced a writ action (Civil Suit No: WA-22M-198-10/2019) ("Suit 198") against all three defendants to recover the outstanding
C sums;

(v) when the three defendants failed to enter appearance to the writ action, judgment in default were entered against all three defendants on 23 November 2016;

D (vi) unbeknownst to the respondent, prior to the commencement of the writ action against the three defendants, the appellant had been adjudicated to become a bankrupt *vide* a bankruptcy petition presented by another creditor by the name OTM Group Sdn Bhd in the High Court of Malaya in Shah Alam *via* Bankruptcy No. BA-29NCC-173-
E 01/2016 ("the 2016 bankruptcy");

(vii) on 13 June 2019, the appellant had successfully obtained an annulment order against the 2016 Bankruptcy under s. 105 of the Act;

(viii) meanwhile, premised on the JID that the respondent had obtained, the
F respondent had commenced a bankruptcy proceeding against the appellant in July 2019;

(ix) on 5 February 2020, the respondent obtained an adjudication and receiving orders ("AORO") against the appellant (second defendant) ("the 2019 bankruptcy");

G (x) the appellant thereafter had applied to set aside the 2019 bankruptcy wherein his application to set aside the AORO was allowed on 22 September 2021; and

(xi) subsequent to successfully setting aside the 2019 bankruptcy, the
H appellant on 14 December 2021 filed an application in Suit 198 (the subject matter of the appeal before us) for *inter alia* the following orders:

(a) an extension of time to file the application to set aside the JID;

(b) to set aside the JID dated 23 November 2016; and
I

(c) leave to defend the action in Suit 198.

Before The High Court

[5] In his application to set aside the JID, the appellant had solely relied on one ground, namely, the JID is an irregular judgment and therefore ought to be set aside *ex debito justitiae*. In asserting that the JID was an irregular judgment, the counsel for the appellant contended that the respondent had irregularly obtained the JID against the appellant considering he was already an undischarged bankrupt at the time when the writ action (Suit 198) was filed. According to the appellant's counsel, when Suit 198 was filed by the respondent (on which the JID was obtained), the respondent had not sought for the statutory leave of court as required under s. 8(1) of the Act.

[6] In support of the above contention, the counsel for the appellant had staunchly argued that the JID entered against the appellant falls within the category of judgment which proved to be null and void on the ground of illegality. Relying on the Federal Court's decision in the case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, the counsel had urged the court to exercise its inherent jurisdiction to set aside the JID *ex debito justitiae*.

[7] The counsel for the appellant had also insisted that the Federal Court's decision in *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241; [1996] 1 MLJ 30 was instructive as the Federal Court had expressly stated that a judgment that has been entered otherwise than in strict compliance with the rules or some statutes or entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity; is an irregular judgment which have to be set aside *ex debito justitiae*. In this regard, the counsel for the appellant had also placed his reliance on another decision of the Federal Court in the case of *Malayan Banking Bhd v. Gan Bee San & Ors And Another Appeal; SKS Foam (M) Sdn Bhd (Intervener)* [2019] 1 CLJ 575; [2019] 2 MLJ 137.

[8] The appellant's application to set aside the JID was strenuously opposed by the respondent on the following grounds;

(i) there was delay on the part of the appellant in making the application;

(ii) the JID is a regular judgment on the grounds set out below:

(a) the respondent had conducted a bankruptcy search on the appellant prior to the filing of Suit 198 and the bankruptcy search did not reveal that the appellant was a bankrupt. Hence, the respondent had no knowledge of the appellant's bankruptcy and therefore the respondent was not required to comply with s. 8(1) of the Act;

(b) since the appellant had successfully obtained an annulment order to annul the AORO (the 2016 Bankruptcy) pursuant to s. 105 of the Act, (the effect of which is as if there was no adjudication and

receiving orders had been recorded against the appellant), therefore, the appellant was no longer a bankrupt at the time the JID was recorded; and

(c) the appellant had no defence on the merits against the respondent's claim.

[9] It is pertinent to note that the other two defendants did not file any application to set aside the JID entered against them.

The SAR's Decision

[10] The Senior Assistant Registrar ("SAR") had dismissed the appellant's application to set aside the JID on 9 March 2022.

[11] On appeal against the dismissal order by the SAR, the learned Judicial Commissioner ("learned JC") had affirmed the SAR's decision and therefore the appellant's appeal was dismissed with costs of RM5,000 to the respondent.

The Learned JC's Findings

[12] The learned JC had identified that the issues that required his determination were namely; (a) whether the extension of time should be granted; (b) whether the judgment in default should be set aside; and (c) whether the appellant should be given leave to defend the action.

[13] Having identified the issues for his determination, the learned JC had thereafter made the following findings:

(i) extension of time;

The application for extension of time applied by the appellant was rejected on the following reasons:

(a) under O. 13 r. 8 of the Rules of Court 2012 read with O. 42 r. 13 of the Rules of Court 2012, the time for applying to set aside a JID runs from the receipt of the order or judgment, not from when a defendant came to know of it;

(b) if it were to run from when the judgment debtor came to know of it, then it would pretty much be a debtor's charter to allege when he came to know of it and expect that allegation to be accepted as the truth (since a plaintiff could not be expected to prove what he knew), and never be out of time.

(c) there was nothing to stop the appellant from applying to set aside the JID concurrently with his application to set aside the 2019 bankruptcy. In fact, had he applied and successfully set aside the judgment first, then the AORO in the 2019 bankruptcy would naturally have fallen because the basis of the bankruptcy proceedings (in which those orders were made) was the JID;

(d) the appellant could not explain the delay, and therefore there is no valid, cogent or acceptable explanation for the delay.

(ii) setting aside the JID;

The appellant is not entitled to set aside the JID *ex debito justitiae* on the following grounds:

(a) whilst an order of discharge would mean that that person is discharged as a bankrupt from the date he obtained that order, any person obtaining an order annulling his bankruptcy would be deemed to have never been adjudged a bankrupt in the first place; and

(b) in this case, the annulment of the adjudicating order necessarily means that there had never been any adjudication and that the appellant (second defendant) was never a bankrupt. Thus, if there was no adjudication and he was never a bankrupt, then there was no requirement on the plaintiff to obtain any leave of the court under s. 8(1) of the Act to file the writ against him. It necessarily follows that the writ and the judgment are regular. Hence, the appellant is not entitled to set aside the JID *ex debito justitiae*.

(ii) defence on the merits;

the appellant has no defence on the merits to the respondent's claim for the following reason:

(a) the appellant in his "cadangan pernyataan pembelaan" had pleaded and admitted that; he is a director of the first defendant, that he did not dispute that the first defendant had obtained loan facilities from the respondent, and that he was the guarantor to the loan facilities. The appellant's foundation of defence was predominantly based on the fact that he was a bankrupt at the time of the writ was filed. As the court had made an earlier finding that the annulment meant that he was never a bankrupt, thus, the inevitable conclusion the court can only make is that the appellant had no defence on the merits to the respondent's claim.

The Appeal Before Us

[14] In his memorandum of appeal, the appellant has set out nine grounds in challenging the learned JC's decision. The nine grounds are as follows:

(a) Pesuruhjaya Kehakiman yang bijaksana terkhilaf dari segi fakta dan undang-undang dalam mendapati bahawa Perayu tidak berhak untuk mengetepikan penghakiman ingkar kehadiran bertarikh 23 November 2016 ("Penghakiman");

A (b) Pesuruhjaya Kehakiman yang bijaksana terkhilaf dari segi fakta dan undang-undang dalam memutuskan bahawa Penghakiman adalah teratur dan boleh diperbetulkan oleh sebab satu pembatalan perintah penghukuman yang dibuat terhadap Perayu;

(c) Pesuruhjaya Kehakiman yang bijaksana terkhilaf dari segi undang-
B undang dengan salah tafsir asas dan kesan Seksyen 105 Akta Kebankrapan 1967 (kini Akta Insolvensi 1967);

(d) Pesuruhjaya Kehakiman yang bijaksana terkhilaf dari segi undang-undang dalam mendapati bahawa tiada syarat atas Responden untuk memperolehi sebarang kebenaran Mahkamah di bawah Seksyen 8(1) Akta Kebankrapan 1967 untuk memfailkan Writ
C terhadap Perayu;

(e) Pesuruhjaya Kehakiman yang bijaksana terkhilaf dari segi undang-undang dalam memutuskan bahawa pembatalan perintah penghukuman yang dibuat terhadap Perayu mempunyai kesan untuk memperbetulkan guaman yang telah difailkan oleh
D Responden terhadap Perayu yang mana adalah dalam pelanggaran Seksyen 8(1) Akta Kebankrapan 1967;

(f) Pesuruhjaya Kehakiman yang bijaksana terkhilaf dari segi fakta dan undang-undang dalam gagal untuk mengambil pengetahuan tentang fakta bahawa penyerahan kertas- kertas kausa adalah salah
E dan tidak beratur;

(g) Pesuruhjaya Kehakiman yang bijaksana terkhilaf dari segi fakta dan undang-undang dalam mendapati bahawa Perayu adalah tidak berhak bagi satu lanjutan masa untuk memfailkan permohonan untuk mengetepikan Penghakiman;

F (h) Pesuruhjaya Kehakiman yang bijaksana terkhilaf dari segi fakta dan undang-undang dalam gagal untuk memutuskan bahawa Perayu adalah tidak perlu mendapat satu lanjutan masa untuk mengetepikan Penghakiman apabila Perayu harus berhak untuk bertindak seperti berikut secara *ex debito justitiae*;

G (i) Pesuruhjaya Kehakiman yang bijaksana terkhilaf dari segi fakta dan undang-undang dalam mendapati bahawa Perayu tidak mempunyai pembelaan yang bermerit kepada tuntutan Responden terhadap Perayu.

Translation (English)

H (a) The learned Judicial Commissioner erred in fact and law in finding that the appellant was not entitled to set aside the judgment in default dated 23 November 2016 ("JID");

(b) The learned Judicial Commissioner erred in fact and in law in determining that the JID was regular and curable because of the
I annulment of the adjudication order made against the appellant;

(c) The learned Judicial Commissioner erred in law by misinterpreting the basis and effect of Section 105 of the Bankruptcy Act 1967 (now Insolvency Act 1967);

(d) The learned Judicial Commissioner erred in law in finding that there was no requirement on the respondent to obtain any leave of court under Section 8(1) of the Bankruptcy Act 1967 to file the Writ against the appellant;

(e) The learned Judicial Commissioner erred in law in determining that the annulment of the adjudication order made against the appellant had the effect of validating the suit filed by the respondent against the appellant which was in breach of Section 8(1) of the Bankruptcy Act 1967;

(f) The learned Judicial Commissioner erred in fact and in law in failing to take cognizance of the fact that the service of the cause papers was bad and irregular;

(g) The learned Judicial Commissioner erred in fact and in law in finding that the appellant was not entitled to an extension of time to file the application to set aside the JID;

(h) The learned Judicial Commissioner erred in fact and in law in failing to determine that the appellant was not required to obtain an extension of time to set aside the JID when the appellant should have been entitled to do so *ex debito justitiae*;

(i) The learned Judicial Commissioner erred in fact and in law in finding that the appellant had no defence on merits to the respondent's claim against the appellant.

[15] Considering the nine grounds raised by the appellant in his memorandum of appeal to challenge the learned JC's decision, upon our close and thorough examination of the record of appeal and the learned JC's grounds of judgment, it is our view that the appeal before us can be determined by answering the following three issues:

(i) issue (i): whether the five years old JID dated 23 November 2016 (from the date of the JID entered to the date of application to set aside the JID was filed) obtained by the respondent against the appellants (who was at the material time an undischarged bankrupt and the respondent had not obtained the leave of court under s. 8(1) of the Act) was an irregular judgment and a nullity and should be set aside *ex debito justitiae*.

(ii) issue (ii): if the answer in issue (i) is in the affirmative, whether the trite legal position that an annulment order made pursuant to s. 105 of the Act has a retrospective effect on a bankrupt's bankruptcy (*ie*, it wipes out the appellant's bankruptcy) would also have a retrospective effect on the irregularly obtained judgment entered against him (wherein it could be interpreted that the annulment

order validated or cured the irregularity of JID as the annulment order has brought the appellant back to the position as if there had not been any adjudication). In other words, the appellant is not a bankrupt at the time when the JID was entered; and

(iii) issue (iii): whether the appellant's delay in filing the application to set aside the irregular JID is a relevant consideration in determining the propriety of the appellant's application.

[16] It must be noted that this court is primarily dealing with an application to set aside a default judgment or order. It is trite that the court's power in setting aside a judgment or order is purely discretionary, although it must be exercised in accordance to established principles of law. Thus, before we embark to deal with the three issues set out above, it is only apt for us to briefly set out the principles of law governing the exercise of the court's discretionary power in this realm of law.

[17] The principles of law relating to the exercise of the court's discretion in setting aside a default judgment or order are well-established. There is a plethora of precedents in which our courts have set the established guiding principles. Suffice for us to mention a few as follows:

(i) *Lai Yoke Ngan & Anor. v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565;

The Federal Court *inter alia* held:

> The principle of setting aside a default judgment under O. 13 r. 8 has been well established and needs no detailed repetition.
>
> *What is important to observe is that a default judgment is not a judgment on the merits. Accordingly, when such judgment is obtained irregularly, such irregularity would be a sufficient ground by itself for setting it aside. But where the default judgment has been obtained regularly, in order to succeed, the defendant must file an affidavit of merits, ie, the defendant must disclose by affidavit evidence that prima facie he has a defence on the merits. Put in another way, the affidavit must disclose that he has an arguable or triable issue on the merits* (see *Evans v. Bartlam* [1937] AC 473). The following judgment of Lee Hun Hoe CJ in *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 MLJ 40 at p. 41 is also instructive:
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> > Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment, if necessary, on terms and allow the case to be heard on the merits. Lord Atkin stated clearly the principles in which the court should act in *Evans v. Bartlam* [1937] AC 473 in these words:
> >
> > ... The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

In the instant case, the learned judge did not consider the judgment to be irregular. *The Mallal's Supreme Court Practice* (second Ed) (Vol 1) at p. 84 explains the position where the judgment is regular thus:

> *The discretion will only be exercised if the affidavit supporting the application to set aside discloses facts showing a defence on the merits; or for some very sufficient reason*: *Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23; *Farden v. Richter* (1889) 23 QBD 124.
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> A defence on the merits means merely raising only an arguable or triable issue, eg contributory negligence in a running down case in *White v. Weston* [1968] 2 QB 647. A judgment in default is not a judgment on the merits: *L Oppenheim & Co v. Mahomed Haneef* [1922] 1 AC 482. (emphasis added)

(ii) *Public Finance Bhd v. Zainal Osman Putera Fotot Studio* [2001] 1 LNS 331; [2001] MLJU 476;

Low Hop Bing, J (as he then was) in his *dicta* stated:

> In an application to set aside a regular judgment in default of appearance, the burden is on the defendant to show a defence on the merits: *Kwong Yik Bank Bhd v. Sa'adiah Bte Mastan* [1994] 2 MLJ 830; *Evans v. Bartlam* [1093] AC 473. It is therefore incumbent on the defendant to show in his affidavit that he has a defence on the merits ... Therefore, where, as in this case, the defendant's affidavit discloses no defence on the merits or for that matter no triable issue or arguable issue, the application to set aside a judgment in default should be dismissed.

(iii) *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175; [2008] 5 MLJ 112; [2008] 3 AMR 576;

James Foong JCA (as he then was) held *inter alia*:

> It is trite law that when considering an application to set aside a judgment in default, the first task is to ascertain whether the judgment is regular or irregular. If it is irregular judgment then it ought to be set aside *ex debito justitiae* but if it regularly obtained then the principles in *Evan v. Bartlam* would apply.

(iv) *Tetuan Tan Teng Siah Realty Sdn Bhd v. Island Oil Palm Plantations Sdn Bhd & Anor* [1997] 4 CLJ 634; [1996] MLJU 602;

Jeffrey Tan J (as he then was) held that:

> A judgment entered in default is not a judgment decided on merits and is liable to be set aside pursuant to O. 13 r. 8 RHC. Where the Judgment is regular there must be shown a defence on merits and where the judgment In default is irregular it can be set aside as a matter of right.

When an application to set aside a default judgment or order is opposed on the ground of delay in making such application, the guiding principle can be found in the following precedents:

(i) *Witech Sdn Bhd & Ors v. BHR Group Ltd* [2010] 9 CLJ 288; [2011] 1 MLJ 781; [2011] 1 AMR 92;

Abdul Malik Ishak JCA held that:

> *The judgments in default are irregular as they were obtained pursuant to O. 19 r. 2(1) of the RHC, which relates to a claim for liquidated demand only. As the respondent's statement of claim was not concerned with a claim for liquidated claim demand only, it was wrong for the respondent to invoke O. 19 r. 2(1) to secure judgment in default; they should have obtained pursuant to O. 19 r. 7(1). The aggrieved appellants are entitled to have the Judgments in default set aside ex debito justitiae.*
>
> *[20] On the issue of delay in moving the court to set aside the default judgment, the following cases are relevant.*
>
> *[21] In the case of Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223, the Court of Appeal stated that:*
>
> *(2) It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim vigilantibus, non dormientibus, jura subveniunt, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable ex debito justitiae, a court may refuse relief is an indolent litigant.*
>
> *(3) In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it ...* (emphasis added)

(ii) *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 1 MLJ 223, CA:

> (2) It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affect his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief is an indolent litigant.
>
> (3) In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it ...

(iii) *Tractors Malaysia (1982) Sdn Bhd v. Chiew Chong Huat & Ors* [1999] 2 CLJ 51; [1999] MLJU 103;

Richard Malanjum, J (as His Lordship then was) held:

> *(1) The exercise of judicial discretion should be strict wherein there is delay in setting aside an irregular judgment or order.*

(2) even in an ex debito justitiae situation, an indolent litigant is still required to give explanation for the delay

(3) Order 42 r. 13 of the RHC clearly states that it is the party intending to set aside or vary such order or judgment (who) must make his application to the court and serve it on the party has obtained the order or judgment within thirty days after the receipt of the order or judgment by him. Hence the first defendant's explanation that he should not be blamed for the delay since the plaintiffs did not make the first move to rectify the defective judgment and order is without merit and not reasonable in the circumstances.

(emphasis added)

(iv) *Latew Bakuh & Anor v. Johari Abdullah & Ors* [2009] 9 CLJ 353; [2009] MLJU 255.

It was held *inter alia* that:

(4) In view of the very lengthy delay in this case right from the time the default interlocutory judgment was served on the appellant to the time the appellants filed in their application to set aside the said judgment for which no acceptable explanation was preferred, the court should not consider the merits of the application. (emphasis added)

(v) *Malayan United Bank Bhd v. Mohammed Salleh Mohammed Yusoff & Ors* [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762;

Zakaria Yatim J held:

The important consideration in an application to set aside judgment in default is whether there is a defence on the merits. The question of delay is a secondary matter.

Issue (I): Whether The Five Years Old JID Dated 23 November 2016 (From The Date Of The JID Entered To The Date Of Application To Set Aside The JID Was Filed) Obtained By The Respondent Against The Appellants (Who Was At The Material Time An Undischarged Bankrupt And The Respondent Had Not Obtained The Leave Of Court Under Section 8(1) Of The Act) Was An Irregular Judgment And A Nullity And Should Be Set Aside *Ex Debito Justitiae*

[18] As was previously contended before the High Court, the counsel for the appellant had argued that the JID entered against the appellant was an irregular judgment and ought to be set aside *ex debito justitiae* as the leave of court under s. 8(1) was absent.

[19] In support of the above contention, the appellant's counsel had placed heavy reliance on the Federal Court's decisions in *Badiaddin* (*supra*), *Tuan Hj Ahmed Abdul Rahman* (*supra*) and *Gan Bee San* (*supra*).

[20] The counsel had impressed upon us that Federal Court in those three cases were instructive that when a judgment had been obtained otherwise than in strict compliance with the rules or some statute, that judgment is a

A nullity and falls within the category of an irregular judgment and therefore this court must exercise its inherent jurisdiction to set aside the judgment *ex debito justitiae*.

[21] The counsel for the respondent had, on the other hand, argued that notwithstanding the fact that the appellant was an undischarged bankrupt at the time when the JID was obtained by the respondent, that fact does not render the JID dated 23 November 2016 to be void or irregular.

[22] The respondent's counsel further argued that before filing the writ action against the three defendants, a bankruptcy search conducted on the appellant on 26 August 2016 had shown that the appellant was not a bankrupt. The writ action was filed on 26 October 2016 and at the time the respondent had no knowledge of the 2016 Bankruptcy recorded on 29 August 2016. It was further argued by the respondent that since the respondent had no knowledge of the 2016 bankruptcy, the respondent was not required to comply with s. 8(1) of the Act.

[23] In addition, the counsel for the respondent also submitted that even if the appellant was a bankrupt at the time of the JID was entered, the 2016 bankruptcy had been annulled pursuant to s. 105 of the Act. According to the counsel, the annulment order had given rise to a resultant effect as though there was no AORO that had been recorded against the appellant. As such, the bankruptcy status of the appellant at the time of the JID was recorded becomes irrelevant.

[24] In other words, according to the counsel, the annulment order obtained by the appellant had placed the status of the appellant in a position as if there was no bankruptcy order that had been made against the appellant. For these arguments, the respondent's counsel had arduously relied on the Federal Court's decision in the case of *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd* [2010] 2 CLJ 661. Learned counsel for the respondent had also cited the cases of *Ho Ken Seng v. Progressive Insurance Sdn Bhd* [2013] 2 CLJ 601; [2013] 2 MLJ 335, FC; (ii) *Ho Ken Seng v. Progressive Insurance Sdn Bhd* [2013] 1 CLJ 518; [2012] 1 MLJ 297, COA; and (iii) *Khaw Tiew Chai v. Lee Chai Seng & Ors And Another Appeal* [2018] 1 LNS 1516; [2018] 12 MLJ 69 and submitted that all these cases had approved and followed the pronouncement made by the Federal Court in *Sardar Mohd Roshan Khan* (*supra*).

[25] On the issue whether the JID was a regular or irregular judgment, we must emphasise one pertinent point here that when considering this issue, the learned JC had actually made a clear finding that any default judgment (alike the JID before him) which has been obtained otherwise than in strict compliance with the rules or some statute is clearly an irregular judgment. The relevant excerpt of the learned JC's finding can be found in para. 25 of his grounds of judgment ("GOJ") which reads:

25. It is not in dispute that the plaintiff did not obtain any leave of the court under s. 8(1) of the Act before filing the writ or entering the judgment. That omission would ordinarily have resulted in the judgment being set aside.

[26] We must say that the learned judge was astutely correct in finding that the omission of the respondent in not obtaining leave of the court under s. 8(1) of the Act before filing the writ action and entering the JID had rendered the JID to become an irregularly obtained judgment and must accordingly be set aside.

[27] The above finding of the learned JC was clearly in consonant with the provision of s. 8(1) of the Act. Section 8(1) of the Act envisages that:

Effect of a Bankruptcy Order

(1) On the making of a bankruptcy order:

(a) *except as provided by this Act, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose*; and

(b) all the property of the bankrupt shall become divisible among his creditors and shall vest in the Director General of Insolvency and the Director General of Insolvency shall be the receiver, manager, administrator and trustee of all properties of the bankrupt.

(emphasis added)

[28] It must be observed that it is clearly stipulated under s. 8(1) of the Act that in the commencement of any action or any other legal proceeding against a bankrupt person in respect of the debt upon which the action or proceeding ought to be commenced, the creditor shall first obtain leave of the court except stated otherwise in the Act. Subsequently, the relevant cause papers ought to be served on the Department of Insolvency and thereafter, the undischarged bankrupt ought to be represented by a counsel provided that sanction has been obtained.

[29] Here, although the respondent's solicitors had conducted a bankruptcy search three months before commencing Suit 198, the counsel for the respondent had conceded that at the time of filing of the writ action on 21 October 2016, the appellant was already an undischarged bankrupt and no leave was obtained pursuant to s. 8(1) of the Act. That being the case, it is not in dispute that the cause papers in Suit 198 were not served on the DGI.

[30] It is to be observed that s. 8(1) of the Act is a specific statutory provision. When there is specific provision of the law requiring leave of court to be obtained before commencing or initiating action against a bankrupt person, that statutory requirement prescribed by the law is to be strictly adhered to.

[31] It must also be emphasised that pursuant to s. 8(1) of the Act, without leave being obtained at first instance, no creditor has any remedy against either a debtor's property or person. Nor can a creditor proceed with or commence any legal proceeding for the debt.

[32] Considering the above deliberations, we are of the considered view that the failure by the respondent to obtain the court's leave before filing or initiating Suit 198 against the appellant was a clear breach of s. 8(1) of the Act and therefore the JID obtained ought to be set aside *ex debito justitiae*.

[33] The application of the *ex debito justitiae* rule has been well explained in the Court of Appeal case of *Lee Tain Tshung v. Hong Leong Finance Bhd* [2000] 4 CLJ 15:

> It is important to notice in Gopal Sri Ram JCA's judgment (above) that the judge was careful not to use the word 'void' in reference to orders of a court of unlimited jurisdiction in the sense that they can be ignored or disobeyed with impunity. He said, at p 426,'Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. **But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose**'. As long as an irregular order stays it must be observed unless and until it is set aside. An irregular order, even where it has been described as 'void' or 'a nullity', stands as an effective order and cannot be ignored with impunity unless and until it is set aside. That is why Gopal Sri Ram JCA said this in *Tenaga Nasional Bhd v. Prorax Sdn Bhd*, at p 488: 'It is settled law that the expressions 'nullity', 'void' and 'voidable' are wholly inappropriate to describe an order made by a court of unlimited jurisdiction'. (emphasis added)

[34] In other words, when a judgment was entered in contravention of a statute (as in this case, the JID was entered in breach of s. 8(1) of the Act), the *ex debito justitiae* rule to set aside irregular judgments applies. This legal proposition has been clearly propounded by the Federal Court in *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241 [1996] 1 CLJ 241 in which Edgar Joseph Jr, FCJ held that:

> *It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity*.

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, *the defendant is entitled to have it set aside ex debito justitiae*, that is to say, irrespective of the merits and without terms. (emphasis added)

[35] The *ex debito justitiae* rule in setting aside irregularly obtained default judgment was again reiterated by the Federal Court in the case of *Malayan Banking Bhd v. Gan Bee San & Ors And Another Appeal; SKS Foam (M) Sdn Bhd (Intervener)* [2019] 1 CLJ 575. Alizatul Khair Osman, FCJ in delivering the judgment of the court had stated:

> [18] It is trite that generally, a court becomes *functus officio* and has no power to vary an order after it has been drawn up. One High Court cannot set aside a final order made by another High Court of concurrent jurisdiction. **An exception to this rule is where an order was irregularly obtained**. The inherent jurisdiction of the court to set aside such an order was succinctly expressed in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 MLJ 30 at 247 (CLJ); 36 (MLJ):
>
> > The general rule is that when it is clearly demonstrated to the satisfaction of the court that **a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae***, that is to say, irrespective of the merits and without terms. (emphasis added)

The Effect Of Annulment Order Under Section 105 Of The Act

[36] Notwithstanding that a finding had been made that the JID entered against the appellant is irregular and must *ipso facto* be set aside *ex debito justitiae*, in the present case the appellant had obtained an annulment order annulling his 2016 bankruptcy status pursuant to s. 105 of the Act.

[37] It is statutorily prescribed that s. 105 of the Act confers upon the court the power or jurisdiction to annul the bankruptcy status of a bankrupt in certain cases.

[38] Section 105 of the Act provides, *inter alia*:

> Power of Court to Annul Bankruptcy Order in Certain Cases
>
> (1) Where **in the opinion of the court a debtor ought not to have been adjudged bankrupt**, or where **it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full**, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the bankruptcy order. (emphasis added)

[39] Section 105 of the Act gives the court the power to grant an annulment order when the court is satisfied that the debtor ought not to have been adjudged a bankrupt. (See: *Shuaib Lazim, Re: ex p; Mercantile Insurance Sdn Bhd* [1992] 4 CLJ 2066; [1992] 3 CLJ (Rep) 58). It is also trite that the jurisdiction conferred upon the court to annul an adjudication is a discretionary one and can only be exercised in cases with special circumstances.

[40] Now, what would be the effect on the bankruptcy status of a bankrupt once the AORO was annulled under s. 105 of the Act? Authorities have shown that a s. 105 annulment order has a retrospective effect on the bankruptcy status of a bankrupt as it wipes out the bankruptcy altogether and effectively put the bankrupt in a position as if no bankruptcy order has ever been made. This legal proposition is established in a number of decided cases, namely;

(i) *Kwong Yik Bank Bhd v. Hah Chiew Yin* [1985] 2 CLJ 31; [1985] CLJ (Rep) 178, the Federal Court had adopted Stirling J's decision *Re Keet* and held that:

> It is pertinent to observe that the bankrupt was not applying for an order of discharge but she was applying for an order annulling her adjudication. **The effect of this is to wipe out the bankruptcy altogether and put the bankrupt in the same position as if there had been no adjudication order** (per Stirling LJ In Re Keet [1905] 2 KB 666 at p. 676). (emphasis added)

(See: *Dato' Hj Mohd Muslim bin Othman v. Shuaib Lazim & Anor* [1993] 2 CLJ 177; [1992] MLJU 109; *Mohamed Hanifa Mohamed Yusoof v. Sikandar Batcha Abdul Majeed* [2002] 7 CLJ 77; *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd* [2010] 2 CLJ 661)

Issue II: If the answer in Issue (i) Is In The Affirmative, Whether The Trite Legal Position That An Annulment Order Made Pursuant To Section 105 Of The Act Has A Retrospective Effect On A Bankrupt's Bankruptcy (*ie*, It Wipes Out The Appellant's Bankruptcy) Would Also Have A Retrospective Effect On The Irregularly Obtained Judgment Entered Against Him (Wherein It Could Be Interpreted That The Annulment Order Validated Or Cured The Irregularity Of JID As The Annulment Order Has Brought The Appellant Back To The Position As If There Had Not Been Any Adjudication). In Other Words, The Appellant Is Not A Bankrupt At The Time When The JID Was Entered

[41] Having briefly explained the power vested upon the court to annul an adjudication order under s. 105 of the Act, we shall now proceed to determine Issue (ii).

[42] As can be seen in the earlier part of this judgment, it is undoubtedly clear that the appellant and the respondent were thoroughly at odds regarding the proper interpretation of the effect of the annulment order on the irregularly obtained JID. In this regard, it is most prudent for us to again reconcile the contrasting interpretations that the parties had proffered.

[43] The appellant posited that the authorities dictate that there cannot be an absolute retrospective effect of an annulment order. Thus, the appellant argued that whilst an annulment order purports to wipe out a bankruptcy and put a bankrupt in the same position as if there had not been any adjudication, the annulment still does not change the character of previous acts/events and does not treat all acts/events taking place during the bankruptcy as though the bankruptcy had never taken place.

[44] To support the above contention, the appellant had cited local authorities as well as authorities from various jurisdictions to show that an annulment order *inter alia* does not wipe out the illegality, criminal liability, abuse of process or other acts/events which contravened the law that had occurred during the term of bankruptcy.

[45] The appellant further argued that the annulment order obtained by the appellant does not validate or cure the omission of the respondent in obtaining leave under s. 8(1) of the Act. In addition, the appellant also argued that the savings in s. 105(2) of the Act only validates all acts done by the DGI, persons acting under the DGI's authority and the court pertaining to the administration of the bankrupt's estate but does not validate or cure an omission or act of a party such as the respondent who is required under the law to obtain leave of court under s. 8(1) of the Act before commencing any action against a bankrupt person.

[46] On the contrary, while heavily relying on the legal pronouncement of the Federal Court in *Sardar Mohd Roshan Khan* (that an annulment order operates retrospectively on the bankruptcy status of a bankrupt), the respondent had argued that since the 2016 AORO obtained against the appellant has been annulled on 13 June 2019, therefore the status of the appellant in 2016 itself was as though there was no AORO that had been recorded against him and thus, the appellant has never been adjudged a bankrupt.

[47] The learned JC had accepted the respondent's interpretation. At this juncture, it is only apt for us to recapitulate the Learned JC's findings. Placing much reliance on the legal principle enunciated by the Federal Court in *Sardar Mohd Roshan Khan* (which were approved and endorsed in several other cases, the learned JC had concluded as follows:

(i) that the annulment of the adjudicating order necessarily means that there had never been any adjudication and the appellant was never a bankrupt. Thus, there was no requirement to obtain any leave of court under s. 8(1) of the Act to file the writ against him.

A (ii) it also necessarily follows that the writ and JID were regular and therefore the appellant is not entitled to set aside the JID *ex debito justitiae*. To succeed in his application to set aside the regularly obtained judgment, the appellant must show that he has defence on merits; and

B (iii) for the law to be fair and equitable, the appellant who has received the benefit of the annulment order must also accept all the negative and adverse consequences that accordingly follow the annulment order.

[48] Was the learned JC correct in law in his analysis? It is clear to us that the learned JC had taken a very simplistic approach which was solely premised on the proposition of law that an annulment order has retrospective C effect on a bankrupt's bankruptcy status as it wipes out the bankruptcy as if there had been no adjudication ever made.

[49] With greatest respect to the learned JC, on the contrary, we find that the learned JC was unfortunately in error as he had failed to appraise the D following considerations;

(i) firstly, we are well aware of the legal precedent that the annulment order has retrospective effect that it wipes out the bankruptcy status of a bankrupt as if there had been no adjudication. Nor are we attempting to challenge that said proposition of law;

E (a) however, we must emphasise that the retrospective effect of the annulment of the bankruptcy is not exactly on point with the circumstances and facts in the present case. Though there is an annulment order annulling the appellant's bankruptcy, however the main issue here is what would the effect of the annulment order be F on the prior irregular/illegally obtained JID years before the appellant's bankruptcy was annulled by the annulment order. The entirety of the appellant's challenge was exclusively pertaining to the propriety of the JID when statutory procedural provision under the Act was not complied with by the respondent at the time when G the JID was entered while the appellant was still a bankrupt person;

(b) the root of the appellant's complaint is plainly obvious; the learned JC had clearly fell into error when he found that the annulment order that he had obtained has a remedial effect on the irregularly obtained judgment. The appellant had firmly stood on the position H that the annulment of his bankruptcy status cannot in any way remedy the respondent's non-compliance of the law. We absolutely agree with the appellant;

(c) in our view, although the learned JC had stated the correct law in I respect of bankrupt's status following an annulment order, however, unfortunately the learned JC had incorrectly applied the said legal principle to be a saving grace to remedy the respondent's clear and indisputable statutory non-compliance;

(d) in this case, the appellant was not asking the court to decide on his bankruptcy status considering the annulment order. Instead, the basis of the appellant's challenge is impugning the jurisdiction (or lack thereof) considering the JID was entered when the appellant was a bankrupt and the respondent's failure to obtain statutory leave of court under s. 8(1) of the Act;

(e) the learned JC had maintained the jurisdiction on which the JID was obtained by the respondent despite the absence of leave of court under s. 8(1) of the Act with the view that by virtue of the annulment order the appellant retrospectively was no longer a bankrupt at the time the JID was entered. Thus, the learned JC found that the retrospective effect of the annulment order has the effect in regularising the JID (and therefore, leave of court was no longer required);

(f) we are of the considered view that the learned JC's finding cannot be the correct proposition of law in the instance of the present case. The learned JC took the position that the annulment order nullified the bankrupt status of the appellant and therefore operated to remedy the non-compliance with the statutory procedure prescribed by the Act on the part of the respondent. By doing so, in other words, the respondent had attained the benefit of the nullification of the appellant's bankruptcy status to the extent that it has given an effect of validating the irregular JID notwithstanding that the statutory requirement has not been complied with by the respondent in the first place;

(g) we must reiterate here that as we had discussed earlier, a default judgment or order which had been entered or obtained otherwise than in strict compliance with the rules or statutes, or entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity; is an irregular judgment or illegally obtained judgment which have to be set aside *ex debito justitiae*;

(h) now, can the annulment of the bankruptcy (though retrospective in nature) wipe out the illegality from the action commenced by the respondent and thereby regularise, cure, or validate the irregular JID? We must highlight that the true legal position is that a nullity or irregularity may be curable depending on the type of nullity or irregularity that was involved in a particular case. (See: *LGB Engineering Sdn Bhd & Ors v. Rayston Resources Sn Bhd* [2022] 1 LNS 1997):

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[72] Learned counsel for the defendants castigated the plaintiff's propositions that "it is trite that a nullity cannot be cured" as being too broadly stated and that it does not exist as a maxim of general application at common law or equity. *We agree with the defendants that the true legal position is that a nullity may be curable depending on the type of nullity that is involved in the case*.

B

[73] *If the alleged nullity arose in judicial proceedings relating to jurisdiction and/or locus standi when it is non-curable and be waived by the parties. ...* (emphasis added)

C

(i) in the present case, it was undisputed that the respondent did not apply or obtain the required statutory leave of court. There is no doubt that s. 8(1) of the Act is compulsory in nature in which it must be strictly adhered to and complied with by a creditor alike the respondent who wishes to recover a debt owed by the appellant. We find that the failure to comply with the said provision is indeed a

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fundamental defect and is non- curable in nature. Had the appellant's 2016 Bankruptcy had been made known to the High Court at the commencement of Suit 198, the inevitable effect would naturally be that the proceedings would have been set aside *in limine*; and

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(j) on this score, we are of the considered view that the non-compliance of a statutory provision such as s. 8(1) of the Act certainly cannot be considered a curable or remediable nullity or irregularity.

(ii) secondly, the appeal before us concerns the status of an irregular JID

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which was entered against a bankrupt person (at the time the bankruptcy was still in effect) prior in time to the annulment order which was obtained years after the JID:

(a) in such a case, it is only prudent for us then to delve further as to the exact reason the Parliament had legislated the statutory

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mechanism in s. 8(1) of the act (to obtain leave of court) before a creditor commences or begins his/her civil action against a bankrupt to recover a debt;

(b) it is a trite legal principle that when a person is made a bankrupt upon an adjudication order, the bankrupt person loses his legal

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capacity. Once a person is adjudged a bankrupt, the official assignee (the DGI) would step into the bankrupt's shoes in which all assets and liabilities of the bankrupt would then be vested with the official assignee (the DGI). Once this takes place, no one can deal with matters relating to the assets and liabilities of the bankrupt except

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with the consent of the DGI. (See: s. 38 of the Act). This is the reason in which the law dictates that when the appellant was made

a bankrupt *vide* the 2016 bankruptcy, he therefore was incapable of maintaining or defending against any action (other than an action for damages in respect of an injury to his person) without the sanction of the DGI as the appellant's assets and liabilities would at the time be vested on the DGI;

(c) likewise, in cases where a creditor wishes to recover his/her debts from a bankrupt, s. 8(1) of the Act prescribed a specific statutory mechanism to pursue such a claim against a bankrupt. Section 8(1) imposes upon a creditor like the respondent the duty and obligation to first obtain leave from the court before initiating or commencing an action against the appellant;

(d) succinctly, one must remember that the leave of court under s. 8(1) of the Act is not a matter of automatic right. A formal application needs to be filed;

(e) the determination whether leave should or should not be granted is entirely upon the court's discretion. In granting the leave, the court must be convinced that the threshold requirements/conditions have been met and even so in granting the leave, the court has the power to impose condition(s) with such leave;

(f) against this backdrop, it is patently clear that under the law it is for the respondent to prove to the court it has satisfied the required threshold to be granted leave. In this instance, it cannot be correct to hold that just because there was an annulment order, the leave of court was no longer relevant;

(g) the burning question then would be, at the time when Suit 198 was filed (when the JID was entered) did the respondent satisfy the necessary threshold for leave to be granted? When such application was not filed at all, it certainly cannot be said that the court even had the opportunity to consider and deliberate on whether or not leave should be granted or otherwise. Again, the benefit that can be derived from the annulment order that he had obtained, is indeed the appellant's benefit *in personam*. Surely, it is not for the benefit of the respondent that could operate as a 'remedial' tool to cure the clear and undisputed non-compliance of law on the part of the respondent.

(iii) thirdly, we have also closely scrutinised the decided cases cited by the respondent in which the retrospective effect of the annulment order (as held in *Sardar Roshan Shah Khan*) was applied. Having scrutinised these cases, we are of the mind that in all these cases the benefit of the annulment order was sought after as a benefit *in personam* only for the bankrupt.

A *Dato' Hj Mohd Muslim Othman v. Shuaib Lazim & Anor* [1993] 2 CLJ 177; [1992] MLJU 109;

(a) in this case, the petitioner objected to both the nomination and election of the respondent as state assemblyman for the N23 Pantai Merdeka constituency in Kedah on the ground that he was at the material time an
B undischarged bankrupt. However, by the time the election petition came up for hearing, the respondent had applied for and obtained an annulment against the adjudication order. Applying the principle in *Kwong Yik Bank Bhd* and *Re Keet*, the learned High Court Judge dismissed the petition and held that the respondent was not a bankrupt
C on 12 March 1990, that is, on nomination day and was therefore not disqualified person for the purposes of election; and

(b) the respondent (the bankrupt person) in this case seeks for *in personam* benefit to be eligible to stand for an election *vide* the retrospective effect of the annulment order.

D *Mohamed Hanifa Mohamed Yusoof v. Sikandar Batcha Abdul Majeed* [2002] 1 CLJ 77:

(a) the defendant (an undischarged bankrupt) was ordered to:

E (1) relinquish to the plaintiff the records and documents of the Pertubuhan Kongres Indian Muslim Malaysia ('KIMMA'); and

(2) refrain from holding himself out as the President of KIMMA for the session of 2000-2002 because under s. 9A(1)(d) of the Societies Act 1966 and art. 17(6) of KIMMA's constitution, an undischarged
F bankrupt cannot be an office bearer.

(b) however, the AORO made against the defendant had been annulled as his debts had been paid in full. The annulment order was issued on 24 November 2000 (after his election but before the application for the above-mentioned orders were made). The defendant applied for a stay
G of the above-mentioned orders pending his appeal to the Court of Appeal. In allowing the stay, the Court of Appeal applied the statement in *Re Keet* and further held that:

> I hold, therefore, that an annulment of adjudication of bankruptcy has retrospective effect, but subject of course to sub-s. (2) of s. 105.

H (c) the defendant in this case sought for the *in personam* benefit to maintain his position as an office bearer of KIMMA *vide* the retrospective effect of the annulment order.

Sardar Mohd Roshan Khan v. Perwira Allin Bank Bhd [2010[2 CLJ 661, FC

I (a) We are aware that in *Sardar Mohd Roshan Khan* the Federal Court had dealt with a judgment obtained by the bankrupt prior to a successful annulment application to discharge the bankrupt. We are also aware that

in *Sardar* (*supra*), the judgment obtained by the bankrupt was also obtained without the requisite sanction by the DGI. Nonetheless, *Sardar* is certainly distinguishable from the present case considering the following:

(1) the extent of statutory non-compliance by the bankrupt in *Sardar* was far less egregious than that of the respondent in the present case. In *Sardar*, the action by the bankrupt *was commenced in 1999 Before his bankruptcy in 2003*. The sanction only became necessary After the action was validly commenced. Thus, at the very least, the action was commenced with due jurisdiction and compliance with the law (unlike the respondent's JID in the present case);

(2) thus, although the statutory non-compliance in *Sardar* might seem to be in the same nature as the present case, the context, nuance, and degree of the non-compliance between the present case and Sardar's case were certainly disparate and distinguishable; and

(3) different from the present case, the party seeking the *in personam* benefit of the retrospective annulment order was the bankrupt himself and not the creditor (alike the respondent in the present case). *Thus, Sardar (supra) was not at all an authority to support the contention that a creditor can enjoy the retrospective benefit of the annulment order which was personal to the bankrupt*. (emphasis added)

Khaw Tiew Chai v. Lee Chai Seng & Ors And Another Appeal [2018] 1 LNS 1516; [2018] 12 MLJ 69:

(a) while in *Khaw Tiew Chai*'s case, Khaw Tiew Chai (the bankrupt) sought for the *in personam* benefit of the retrospective annulment order so as to render himself competent to maintain a suit to protect his shares in a company;

(b) we must reiterate that in all the above cases the courts had applied the retrospective effect of the annulment order strictly and only for the benefit of the bankrupt himself and not for any other party;

(c) we are minded that none of the decided cases referred to by the respondent was an authority to contend that an annulment order's retrospective effect was absolute to erase everything and anything prior to the annulment order. Nor did the cases stipulate that any persons other than the bankrupt can reap the benefit of the annulment order and erase that person's own statutory contravention and irregular actions or judgments which occurred or were committed during the period of bankruptcy (prior to the annulment order);

(d) considering the above deliberations, it is therefore appropriate and just for us to conclude that an annulment order cannot be wielded against the bankrupt who had his bankruptcy annulled. The annulment order must indeed be used for the bankrupt's own benefit and not for the benefit of others;

(e) that being the position, we find that the learned JC clearly fell into error when he held that for the law to be fair and equitable, the appellant having been granted the annulment order must also accept all the negative and adverse consequences that come of and with it. The respondent cannot simply act in contravention of a statute in the 'hopes or anticipation' of an 'erasure and remedy' that might or might not occur at the mercy and fortune of the appellant's application for annulment;

(f) as far as the plight of a bankrupt is concerned, his competency and capacity are at stake and it is in a bankrupt's interest that he contends that he should not have been made a bankrupt in the first place. And if the appellant was successful to prove his contention, then he should be allowed to reap the benefit of the annulment he so have sown. We cannot say the same for the respondent. The respondent's cause of action against the appellant remains unchanged notwithstanding the appellant's bankruptcy. It was not the respondent who went out of its way to seek for the annulment. Thus, if the respondent seeks genuine redress of the court, then it remains incumbent upon the respondent to abide by and comply with all enforceable laws and statutes as at the time the respondent commences or proceeds with its action (and not simply transgress against the law and later hope for the 'good fortune' in the appellant's annulment application);

(iv) fourthly, while it is true that an annulment has the general effect of treating the former bankrupt as if no bankruptcy order had been made against him, the fact that a bankruptcy order was in fact made should not be wholly disregarded. In the UK case of *Engel V Peri* [2002] EWHC 799 (CH), (Chancery Division), Ferris J held as follows:

> [39] All this indicates, in my judgment, that **an annulment does not have the effect of requiring the bankruptcy order to be treated for all purposes as if it never had been made**. In relation to matters consequential upon the annulment it is recognised that, while the order subsisted, there was a bankrupt and a trustee in bankruptcy and a requirement that the assets and liabilities of the bankrupt be dealt with in a particular way. The manner in which a challenge to the propriety of anything done while the order subsisted is to be made is not spelt out, but once it is recognised that there was a

> bankrupt and a trustee in bankruptcy there appears to me to be no difficulty in concluding that ss. 303 and 363 continue to have effect for the purpose of enabling questions in relation to acts done or omitted while the order subsisted to be determined.
>
> (emphasis added)

(a) the retrospectivity of an annulment order does not go as far as to wipe out the fact that there indeed existed a bankruptcy order. A bankruptcy order and an annulment order are indeed mutually exclusive. One cannot exist without the other. An annulment application cannot be filed, and an annulment order cannot be granted unless there was first a bankruptcy order. Thus, the retrospectivity of the annulment order to an extent, cannot in totality ignore the fact and existence of a bankruptcy order was once granted in the past;

(b) the appellant had furnished unto us some precedents which held that the retrospective effect of an annulment order is not absolute in that it does not change the character of certain acts or events. These authorities stipulated that the annulment order inter-alia does not wipe out illegality, criminal liability, abuse of process or other events or acts which contravene the law. (See: *Lau Kok Loon v. Low Yee Meng* [2021] 8 CLJ 643; [2021] MLJU 1105 10; *Inland Revenue Commissioners v. McEntaggart And Another* [2004] EWHC 3431; *Munday v. Hilburn* [2014] EWHC 4496, *Roberts v. Wayne Roberts Concrete Construction* [2004] 208 ALR 532 and *Oraki And Another Dean & Dean (A Firm) And Another* [2013] EWCA Civ 1629).

(v) fifth, it must also be minded that the Act itself *via* s. 105(2) only validates all acts done by the DGI, persons acting under the DGI's authority and the court pertaining to the administration of the bankrupt's estate. It definitely cannot be taken to operate to validate the statutory non-compliance of a creditor who seeks to recover a debt owing by the bankrupt. Section 105(2) of the Act reads:

> *(2) Where a bankruptcy order is annulled under this section, all sales and dispositions of property, and payments duly made, and all acts thereto are done by the Director General of Insolvency, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court appoints, or in default of 100 Laws of Malaysia Act 360 any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court declares by order*

A **Issue (III): Whether The Appellant's Delay In Filing The Application To Set Aside The Irregular JID Is A Relevant Consideration In Determining The Propriety Of The Appellant's Application**

[50] Having made our findings in respect of issues (i) and (ii), it is therefore no longer necessary for us to delve into or determine issue (iii). For the sake of completeness, we however will proceed to determine this final issue.

[51] Now, we are most minded of the trite principle, delay defeats justice. Nor do we stand to oppose this salient and celebrated principle of law. But we must also appreciate the true mischief in which the principle seeks to remedy or curb. That mischief would be undue delays willingly or knowingly perpetrated by the indolence or ignorance of a party sleeping on his rights.

[52] The Federal Court in *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 MLJ 30 further explained that although delay defeats justice, the court still retain some discretion to set aside *ex debito justitiae* an irregular judgment or order despite a long delay if the delay can be explained or justified:

> **It is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay**, provided it is satisfied that: (i) no one has suffered prejudice by reason of the appellant's delay; (ii) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or (iii) to let the judgment to stand would constitute an oppression (see p 42G-H) *Atwood v. Chichester* (1878) 3 QBD 722 and *Harley v. Samson* (1914) 30 TLR 450 followed. (emphasis added)

[53] Considering the chronology of facts in this case, we are of the mind that it cannot be said that the appellant was in any manner or measure indolent or ignorant in protecting his rights. Since the advent of the 2016 bankruptcy, he had fought tooth and nail to annul the 2016 bankruptcy (and he succeeded). Of course, we are aware that the appellant did not enter appearance in the respondent's irregular action in 2016, but that action was irregular, and in the larger scheme of the appellant's position and interest, it cannot be said that he was standing idly by totally indolent and nonchalant to his affairs in court. He fought, and was continuously fighting.

[54] Even in respect of the 2019 bankruptcy, the initial delay from the 2016 JID to the 2019 bankruptcy was brought upon by the respondent itself. It had obtained the JID in 2016, but only commenced the 2019 bankruptcy proceedings (based on the JID) in July 2019. The AORO for the 2019 bankruptcy was only granted on 5 February 2020.

[55] Upon facing the 2019 bankruptcy, the appellant was left to either impugn the 2019 bankruptcy order itself or to impugn the JID which formed the basis of the 2019 bankruptcy. Considering the appellant's bankrupt status at the time, of course he would be incompetent to commence or defend against any action unless he obtains the DGI's sanction under s. 38 of the

Act. Thus, the appellant would not be competent on his own capacity to apply for the JID to be set aside. Alternatively, the appellant remains competent (despite the bankruptcy) to opt to challenge the bankruptcy by applying to set aside the 2019 AORO under ss. 92(1) and 105(1) of the Act without having to apply for a sanction by the DGI (see Federal Court in *Ho Ken Seng v. Progressive Insurance Sdn Bhd* [2013] 2 CLJ 601; [2013] 2 MLJ 335, FC)

[56] We are aware that there was nothing to bar the appellant from applying for the DGI's sanction to timeously file an application to set aside the JID. We are also minded that both the setting aside JID application and the setting aside AORO application can in fact run concurrently. But there was never any rule that the two applications had to be filed concurrently.

[57] To our mind, a successful application to set aside the AORO would have a similar effect and consequence to an application for the DGI's sanction. *Vide* the former, the appellant would attain competence *via* the retrospective effect of the AORO being set aside while *vide* the latter, the appellant would directly attain competency *via* the DGI's sanction.

[58] Thus, we would surmise that the appellant's election to first apply for the setting aside of the AORO to be a practical and prudent act in protecting the appellant's position. Now, we must stress that by no means are we denying that there was considerable delay on the appellant's part. However, we also cannot conclude that the said delay was reflective of any form of arrogance or indolence of the appellant in defending his interest.

[59] There was indeed delay, but it is only just and appropriate that we exercise our discretion in the present case considering the appellant's unrelenting tenacity to defend against the respondent's claims. All these facts coupled with the respondent's irregular commencement of Suit 198 and the irregular attainment of the JID would clearly justify that the appellant should have his day in court to defend against the respondent's claims. This was not a case where the appellant quietly and idly sat on his rights to defend himself.

[60] In any case, we fail to see what prejudice could have befallen the respondent if the irregular JID was set aside. The JID was already in essence statutorily wrong or irregular. There was no urgency from the respondent itself to enforce the JID promptly after the JID was irregularly entered. The respondent itself has its own delays and statutory transgressions of its own brand and make. Thus, if we were to afford leniency to the respondent, we ought to justly and equally afford leniency to the appellant. Thus, it would be in the best interest of all parties that the appellant and defendant be given their respective days in court to prove their respective cases. This is especially fair considering that the merits of the parties' claim and defence had never been put to proper trial.

[61] In fact, we dare say that the respondent would reap better benefit if it were to successfully prove its claim against the appellant while he is still a going concern as the respondent can directly enforce the judgment (if any) against the appellant's assets without having to compete for priority in a ravenous pool of all the appellant's other creditors.

[62] Considering all of the above in this part, we find that the learned JC was in error when he dismissed the appellant's application on the ground of the appellant's supposed delay.

Our Decision

[63] Considering all of the above deliberations, we hereby allow the appellant's appeal with costs of RM10,000 here and below to be paid by the respondent to the appellant subject to payment of allocator.

[64] We also order that the order of High Court dated 12 May 2022 be set aside and the case to be remitted back to the High Court of Malaya in Kuala Lumpur for the respondent's Suit 198 against the appellant to proceed and a case management date in the Kuala Lumpur High Court be fixed on 16 November 2022.

[65] We must also record here that at the time when this grounds of judgment was being prepared, the Presiding Chair Justice Datuk Suraya binti Othman has since retired.